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Employers Beware: Task Force Issues Report on Employee Misclassification

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In 2018, Governor Phil Murphy established a “Misclassification Task Force” to combat unfair labor practices through the misclassification of workers as independent contractors rather than employees. The Task Force recently released its findings and recommendations. It concluded that the practice of illegally and improperly classifying workers as independent contractors rather than employees has increased by approximately 40% in the last ten years. The practice is most prevalent in construction, janitorial services, home care, transportation, trucking and delivery services, and other labor-intensive sectors.

Rather than use the IRS 20-factor test to determine whether a worker is an independent contractor, New Jersey has adopted the more stringent “ABC test.” Pursuant to this test, a worker is presumed to be an employee unless the employer can demonstrate that: 1) such individual has been and will continue to be *free from* control or direction over the performance of such service, both under his or her contract of service and in the actual performance of the individual’s service; and 2) such service is either outside the usual course of business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and 3) such individual is customarily engaged in an independently established trade, occupation, profession, or business.

The Task Force concluded that businesses often misclassify workers to reduce labor costs. The misclassified workers are deprived of numerous rights guaranteed to employees, but not independent contractors, such as the rights to overtime pay; workers’ compensation benefits; unemployment benefits; earned sick leave; job-protected family leave benefits; health and safety protections; protections under state and federal anti-discrimination laws; and to organize under the National Labor Relations Act. Misclassification also hurts the State through the loss of tens of millions of dollars yearly in lost income taxes, unemployment contributions, and disability contributions.

The Task Force issued the following recommendations to combat this growing problem:

Florham Park

220 Park Avenue
Florham Park, NJ 07932
973-539-1000

Paramus

115 West Century Road
Suite 100
Paramus, NJ 07652
201-262-1600

Sparta

351 Sparta Avenue
Sparta, NJ 07871
973-295-3670

New York

9 East 40th Street
New York, NY 10016
646-652-7775

1. **Targeted Education and Public Outreach** through the creation of a hotline, webpage, and email address to report misclassification; by requiring employers to post notices alerting workers to the issue; and by raising public awareness through press strategy;
2. **Strengthening State Contracting** by requiring entities that contract with the State or receive State funding to confirm that they are aware of the legal standard for proper classification of workers based on the “ABC test,” with potential loss of funding or contract termination if misclassification is found;
3. **Interagency Coordinated Enforcement** by conducting on-the-ground investigations and joint enforcement sweeps with multiple agencies, and working together to elicit facts and obtain information using each agency’s jurisdictional knowledge and expertise;
4. **Data Sharing** through the sharing of information between government agencies;
5. **Cooperation with Neighboring States** through the sharing of information to assist in investigations;
6. **Cross-Training** for field investigators from various state and local agencies;
7. **Criminal Referrals** of cases to the Office of the Attorney General;
8. **Utilization of Workers’ Compensation Laws**; and
9. **Use of DOL’s Power to Revoke and Suspend Licenses.**

The Task Force also advocated for legislation that:

1. Requires public posting of notices regarding misclassification;
2. Gives the DOL the ability to issue stop-work orders;
3. Grants the DOL the same access to tax information as other Cabinet agencies;
4. Imposes liability on employers who rely on companies that misclassify in their supply chain, in subcontracts, or other contracts where a joint employment relationship is established;
5. Imposes liability on business owners and successor entities that misclassify;
6. Requires companies found to misclassify to fund the investigatory costs and any attorney’s fees incurred; and
7. Increases fines and penalties.

The Task Force concluded by stressing the importance of the State more strictly monitoring and punishing those employers who misclassify employees. SPSK advises employers to review their current worker classifications and to remain compliant with State standards. Failure to do so may result in loss of state funding and/or contract termination, revocation/suspension of license, or criminal prosecution. For more information on this Legal Alert or related issues, please contact the labor and employment attorneys at SPSK.

DISCLAIMER: This Alert is designed to keep you aware of recent developments in the law. It is not intended to be legal advice, which can only be given after the attorney understands the facts of a particular matter and the goals of the client.